82-1252

No._____

IN THE

Supreme Court of the United States

October Term, 1982

JESSE H. BECTON,

Petitioner,

v.

DETROIT TERMINAL OF
CONSOLIDATED FREIGHTWAYS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Questions Presented:

1. Whether this Court's Opinion in Alexander v. Gardner-Denver, 415, U.S. 36, permits a court, in all cases, to hold that an arbitration decision in favor of the employer is sufficient to fulfill the employer's burden of articulating some legitimate non-discriminatory reasons for its actions.

2. Whether a District Judge in making broad, general and conclusory findings, and not revealing the factual or legal basis for his decision, complies with the requirements FRCP 52 (a).

3. Whether the Sixth Circuit should be required to come into conformity with the Fourth, Seventh and Ninth Circuits which have ruled under similar circumstances that broad general and conclusory findings do not satisfy the requirements of Federal Rule of Civil Procedure 52 (a).

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CITATIONS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

JESSE BECTON petitions for a Writ of Certiorari, to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. 1A through 6A) is reported at 687 F2d 140. The Opinion of the District Court (App. 9A - 19A) is reported at 490 F. Supp. 464. An Order Denying Motion to Amend Judgment and Making Additional Findings of Fact (App. 20A, 21A) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 24, 1982 (App. 1A). A timely petition for rehearing and a suggestion for rehearing en banc was denied on October 27, 1982 (App. 8A). The Petition for Certiorari was filed within ninety (90) days thereof. Petitioner invokes the jurisdiction of this Court under 28 USC 1254 (1).

STATUTES INVOLVED

Federal Rule of Civil Procedures
RULE 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injuctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the

findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Petitioner, JESSE BECTON, who is half Black and half Seminole Indian, was discharged on May 14, 1979 after two and one-half years employment as an over the road truck driver for Respondent, Detroit Terminal of Consolidated Freightways. He filed a grievance pursuant to the grievance-arbitration clause of the contract in existence between the Respondent and Local 299 of the International Brotherhood of Teamsters. The Michigan Joint State Cartage and Over the Road Arbitration Committee (hereinafter Arbitration Committee) on July 9, 1979 upheld the discharge. On November 19, 1979 it refused to reconsider its decision.

On December 19, 1979, Petitioner filed a complaint along with a motion for a Temporary Restraining Order in the District Court for the Eastern District of Michigan[1]. Petitioner brought his action under 42 U.S.C. 1981, and added a pendent state claim under the Michigan Elliot-Larson Civil Rights Act. M.C.L.A. Sec. 37-2101 et seq., alleging that his discharge was both the result of racial discrimination, and retaliation for having previously filed charges with local civil rights agencies.

Petitioner contended, and introduced evidence to show: (1) that he was not guilty of the rule violations that he was discharged for (App. 22A - 35A);[2] (2) that in any event, the Respondent had a practice of disciplining Black drivers more harshly than White drivers for the same or comparable

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[1]Petitioner filed for a Temporary Restraining Order because the Respondent at the time was anticipating a change of operations whereby The Detroit Terminal was to be closed to Over The Road Drivers. Petitioner anticipated that he would have significant difficulty prevailing and being made whole if he did not seek immediate relief.

[2]Petitioner was discharged for flagrant disobedience of (continued on next page)

offenses; (3) by White drivers that such disciplines occurred especially after Black drivers filed civil rights charges (App. 22A-74A).

Petitioner later substituted a Motion for Preliminary Injunction for his Motion for Temporary Restraining Order. Later the hearing on the Motion for Preliminary Injunction was combined with a trial on the merits.

Hearings were held on January 28, 19, & 30, February 20, 22, 25, 26 & 27 and May 1, 1980. Testimony was given by twelve witnesses and three witnesses testified through depositions. Over two hundred exhibits were introduced.

After trial, on June 5, 1980 the District Judge issued a Memorandum Opinion and Order in which he found Petitioner's case distinguishable from Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), in that Petitioner had not raised the issue of discrimination at the proceedings before the Arbitration Committee. Because of this difference the Court reasoned that while Petitioner had made out a prima facie case of discrimination, the Arbitration Committee's decision that there was apparent "just cause" under the contract to sustain the Respondent's actions was final and binding on the Court. Therefore, with respect to the employers' burden to rebut, the Court held the Arbitration decision sufficient so that it need not consider the evidence presented on this issue. (App. 18A). The District Court then in broad conclusory terms stated:

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orders having allegedly refused to drop and hook a trailer at Respondent's Jackson Michigan Terminal. This was considered a violation of Rule 3(g) of the Uniform Rules and Regulations (hereinafter URR) that has governed the conduct of truck drivers in Respondent's employ since 1950. (App. 77A, 78A). The first offense under Rule 3(g) is a written warning. The second offense is discharge. Also under the URR any infraction for which a written reprimand is the punishment will be forgiven in six months. Infractions which require disciplinary time off will be forgiven after nine months.

> "The inquiry now turns to whether the Plaintiff has shown that the just cuase that did exist was merely pretext to cover up what was in reality a racially discriminatory discharge. Only by such a showing can the Plaintiff prevail in this action.
>
> The Court finds that from the evidence produced in this case that the discharge was not a prextext to cover up racial discrimination nor was racial animus involved in the discharge.
>
> The Court finds that although the Plaintiff had filed other civil rights claims and asserted his civil rights in other contexts, the Defendant did not act by way of retaliation in discharging him.
>
> (App. 18A).

In response to this opinion, Petitioner made a motion to amend judgment and for supplemental findings. The District Court, while finding no reason to change its view of the law regarding the Gardner-Denver issue, augmented some of its findings of fact. The District Court said even if its view of the law were incorrect, the decision would not change. The Court stated:

> Not only was the decision to discharge founded upon just cause so as to satisfy the employment contract, but it was based upon reasons appropriate under the law. The Court finds that the Plaintiff's employment history and the facts surrounding his failure to do the acts requested at the time of his discharge, shows that the actions of the Defendant were appropriate and that the stated reason for the discharge was not used as a pretext to cover up a racially discriminatory discharge. The evidence produced by the Plaintiff in an attempt to show that white drivers were not treated as severely was not directly on point and it failed to show by a preponderance of

> the evidence that there existed any racial discrimination in connection with Plaintiff's discharge.
>
> In addition, the evidence did not preponderate in favor of Plaintiff's claim that any of the Defendant's actions were in retaliation for the fact that Plaintiff had taken steps to assert his civil rights. (App. 21A).

A timely appeal was taken to the Sixth Circuit Court of Appeals.

The Sixth Cirucit, reversed the District Judge's interpretation of Gardner-Denver as being "impractical and excessively narrow". However, the Appellate Panel did hold that:

> Certainly the court may consider the arbitration decision as persuasive evidence that the grounds found by the arbitrator to be just cause for discharge under the collective bargaining agreement are sufficient to amount to just cause. The court should defer to the arbitrator's construction of the contract. Moreover, an arbitration decision in favor of the employer is sufficient to carry the employer's burden of articulating "some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, 411 U.S. at 802, 93 S. Ct. at 1824. See also Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093-94. (1981). (App.).

Although the panel agreed that the District Court had applied an improper legal standard, a remand was not ordered.

The Appellate Court, citing the District Court's Supplemental Order, stated:

> we will not remand this case merely so the

> court can reconsider the same evidence and inevitably reach the same result.
> (App.6A)

Although the panel admitted that they might have reached a different conclusion de novo they did not find the District Judge's findings clearly erroneous. (App. 6A).

The Appellate Panel, however, characterized the District's Court's findings very differently than the District Court had. For example, the District Court had found that, "The evidence produced by Petitioner to show that White drivers were not treated as severely was not directly on point ..." The Appellate Panel characterized this as a finding that Petitioner "was treated no differently than non-minority employees." (App. 6A). Finally, the Panel rejected the argument that the District Judge's findings were inadequate under rule 52(a) of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals, correctly found the District Court had formulated an "impractical and excessively narrow application" of the holding in Alexander v. Gardner-Denver, supra when it declined to reconsider evidence previously submitted to the Arbitration Committee on the issue of just cause for Plaintiff's termination.

The Court of Appeals, however, as noted above went on to observe:

> We do not hold that the arbitration decision is without significance. Certainly the court may consider the arbitration decision as persuasive evidence that the grounds found by the arbitrator to be just cause for discharge under the collective bargaining agreement are sufficient to amount to just cause. The court should defer to the arbitrator's construction of the contract. Moreover, an arbitration decision in favor of the employer is sufficient to carry the employer's burden of articulating "Some legitimate, nondiscriminatory reason for the employee's re-

jection." McDonnell Douglas Corp. v. Green, 411 U. S. at 802. See also Texas Department of Community Affairs v. Burdine, 450 U.S., 248, 252-53 (1981). (App. 5A).

Petitioner takes issue with the use of the mandatory language in the above passage, to wit: . . .The court should defer to the arbitrator's constructions of the contract, . .. and ... an arbitration decision in favor of the employer is sufficient to carry the employer's burden..."

The source of this concern is this Court's holding in Gardner-Denver where the Court states that an arbitral decision which is admitted as evidence should be "accorded such weight as the Court deems appropriate." Gardner-Denver, supra at 60. While not adopting any standards as to how the court should determine the weight to be given a particular arbitral decision, the Court, by way of footnote suggested, that the more the arbitration proceeding resembled a judicial proceeding, the more weight it should be given. Gardner-Denver, supra at 60. Logically, then, little or no weight could and should be given to an arbitration decision where the manner in which the decision was reached provided few if any procedural safeguards or considered any legal standards similar to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 e or 42 U.S.C. 1981.

Thus, under certain circumstances,[3](and Petitioner would argue the present case is one of those), it may be perfectly appropriate for a court to give no weight and no deference to an abritrator's findings or interpretation of a contract.

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[3]Under the Teamster Contract, a decision is made by a Committee made up of equal numbers of employer, and union representatives. The format of the hearings does not permit the grievant to speak or present witnesses, or to cross-examine witnesses against him. The Business Agent presents all the evidence on behalf of the grievant and the grievant can speak in response to questions. As the minutes of the meeting where Plaintiff's discharge was upheld show, (App. 79A) no reasons were given to support the Committee's (continued on next page)

To be consistent with the Supreme Court's holding in Gardner-Denver, the wording of the Court of Appeals decision ought to read: "the Court may defer to the arbitrator's interpretation of the Contract," and "an arbitration decision in favor of the employer may be sufficient to meet the employer's burden..." Although the Sixth Circuit is the first appellate court to consider this issue, its apparent conflict with the principles enunciated by this Court in Gardner-Denver warrants review by this Court.

2. The District Judge in his reported decision, after ruling that he would be bound by the arbitrator's "just cause" finding, made no further findings of fact or conclusions of law. In broad, general and conclusory terms the Trial Judge stated, in essence, that the evidence failed to show pretext, discrimination and/or retaliation. The findings in the District Judge's Supplemental Opinion are not much more specific. In general and conclusory terms the District Judge found there was "just cause" to terminate Plaintiff and that "the stated reason for the discharge was not a pretext." As to the evidence of White drivers, "it was not directly on point and it failed to show by a preponderance of the evidence that there existed any racial discrimination." (App. 18A, 19A, 121A). As to Plaintiff's retaliation claim, the District Judge again without any findings of fact, said the evidence did not "preponderate in" favor of Plaintiff's retaliation claim.

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decision. Petitioner's case was only one among the approximately four hundred (400) cases brought for consideration by the Committee sitting on July 10-11, 1979. It was the 379th matter to be heard. Based on the number of cases heard by the Arbitration Committee in the two days of hearing, Petitioner calculates that the average amount of time afforded each case (for both presentation and decision) is approximately 8 minutes. For these reasons, the District Court, (consistent with Gardner-Denver, supra) instead of conclusively binding itself by the arbitrator's decision, should have given no weight to the decision.

This Court has the prime responsibility for the proper functioning of the federal judiciary. Part of that responsibility is to ensure that the Federal Rules of Civil Procedure are properly construed and followed. Petitioner will argue infra that there is a divergence of views in the circuits concerning the sufficiency of findings to comply with Rule 52(a) in employment discrimination cases which warrants the granting of the writ. Herein, however, Petitioner argues that broad general and conclusory findings which do not fully reveal the factual or legal bases for the Trial Judge's decision should not be deemed sufficient to satisfy the requirements of Rule 52(a).

As stated by Professor Moore:

> The purpose of findings of fact is three-fold: as an aid in the trial judge's process of adjudication; for purposes of res judicata and estoppel by judgment; and as an aid to the appellate court on review.
>
> 5A Moore Federal Practice, 52.06 at p. 2706.

For the purposes of this case the observation of Judge Frank in U.S. v. Forness, 125 F.2d 928 at 942 (CA.2), is instructive:

> "We stress this matter because of the grave importance of fact finding. The correct finding, as the near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is faulty as one which results from the application of the 'wrong' legal rule to the 'right facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.'

Because an error of law can more easily be corrected by

an Appellate Court than an incorrect finding of fact, it is absolutelyessential that the Trial Judge's findings and conclusions reveal the legal principles followed as well as the facts found in support of the decision.

In Petitioner's case, the District Court's very broad and conclusory findings reveal neither the legal principles nor the facts found by the Judge to support his legal principles.

This is very evident especially with respect to Plaintiff's proofs on pretext. The District Judge stated in his reported Opinion, that he was following the principles of McDonnell Douglas v. Green, supra. However, after deciding that he was bound by the arbitrator's decision, he made no other findings except that there was no pretext, no discrimination, and no retaliation. (App. 18A, 19A). In his supplemental Order the District Judge found as to pretext that the evidence produced to show that White drivers were not treated as severely "was not directly on point". (App. 21A).

What legal standard was the Judge using to determine whether Petitioner had proven pretext? By stating evidence of White drivers was not directly on point was the Trial Judge saying that the only evidence relevent to show pretext is that White drivers under the exact same circumstances as Petitioner received different treatment? If so, this directly contradicts McDonnell Douglas v. Green, supra[4].

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[4]In McDonnell Douglas v. Green, supra at 804, this Court states: Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit Petitioner to use Respondent's conduct as a pretext for the sort of discrimination prohibited by Sec. 703 (a) (1). On remand, Respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that Petitioner's stated reason for Respondent's rejection was in fact pretext. McDonnell Douglas, supra at 804 (emphasis added).

(continued on next page)

If not, what was the District Judge saying? If he was not applying an impermissibly narrow view of evidence which could be relevant to proving pretext, why did he fail to even mention or evaluate the broad categories of evidence presented by Petitioner to show pretext? These categories included: a) evidence that Petitioner was subjected to a direct racial slur from a supervisor, (App.34A, 35A); b) the evidence from three other Black drivers (who along with Petitioner constituted at least 40% of all Blacks who worked for the Respondent) (App. 80A) who testified that they had been subjected to similar treatment as Petitioner, especially after they filed civil rights charges (App. 35A - 74A); or c) the statistical evidence which showed that few if any Blacks worked in the Respondent's Detroit Terminal until two years before Petitioner was hired and that, after affirmative action pressure in the mid 1970's, the percentage of Black drivers, which hit a peak in 1976, began to drop (App. 42A, 80A); or d) evidence of the disproportionate number of discharges imposed on Blacks (App. 81A - 95A); e) evidence that the

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In expounding on what evidence could be relevant to a finding of pretext, this Court stated:

Especially relevant to such a showing would be evidence that White employees involved in acts against Petitioner of comparable seriousness to the"stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races. Other evidence that may be relevant to any showing of pretext includes facts as to the Petitioner's treatment of Respondent during this prior term of employment; Petitioner's reaction, if any, to Respondent's legitimate civil rights activities; and Petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to Petitioner's employment policy and practice may be helpful to a determination of whether Petitioner's refusal to rehire Respondent in this case conformed to a general pattern of discrimination against Blacks. McDonnell Douglas, supra at 804-805.

Respondent had wide ranging discretion as to what discipline to impose. (App. 74A - 76A).

Furthermore, Petitioner submitted by way of testimony and documents evidence of seven (7) occasions where White drivers from the Respondent's Detroit Terminal had not been disciplined at all for refusing the same order that Petitioner was fired for allegedly refusing (App. 35A, 39A, 40A, 54A, 96A)[5]; documentary evidence was introduced to show that White driver King, who have flagrantly failed to call his dispatcher was not disciplined at all (App. 97A - 112A), whereas Petitioner under the exact same situation was discharged in January 1979 for flagrantly disobeying orders,[6] (App. 113A, 114A); and evidence was introduced to show that White driver R. Glisson who had been given two 3(g) infractions in a six (6) month period was not fired. (App. 115A - 116A).

Despite this evidence, nowhere did the District Judge explain how this evidence was not directly on point, and why as a matter of law the Court did not evaluate the case under the standard in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, and its progeny. This line of cases holds that where a Plaintiff has made out a prima facie case of

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[5]Several of these incidents involved a White driver who claimed he had a bad back. Although Respondent in its Appeals Court Brief page 38 claimed this was a valid medical excuse, Respondent's accepting such an excuse is itself discriminatory since Mr. Kelley, who had a back injury, was told he could not come back to work until he was 100%. (App. 56A).

[6]This discharge was reduced in the grievance procedure. It was this discipline in January 1979 which allowed the Respondent to discharge Petitioner in May since the 3(g) violation Petitioner was given in May constituted the second 3(g) violation within six months.

actual disparate treatment the Defendant must articulate a legitimate non-discriminatory reason for the disparity as well as a legitimate nondiscriminatory reason for the discharge Mosely v. General Motors 497 F Supp. 583 (F.D.. Missouri). Indeed, in light of the proofs, it was an error of law for the Court to analyze this case solely under the McDonnell Douglas v. Green, supra requirements.

Nowhere in the District Judge's reported or supplemental decision does he address the proper legal standard, either under 42 U.S.C. 1981 or under the pendent state law claims to be applied to the Petitioner's retaliation claim. Indeed the Sixth Circuit's decision does not even mention that claim. Far from providing the Court of Appeals with a specific basis for its decision, the District Court's Opinion and Supplemental Order raised many questions as to which legal standards it had applied. The Court of Appeals should not have attempted to decipher the District Court's bare bones opinions, especially since it had already overturned a central error of law that had colored the rationale of those opinions.

In Petitioner's case, as noted above, the Sixth Circuit panel, although finding that the District Judge had applied an erroneous legal standard, failed to remand. The Panel, despite the District Court's broad and conclusory findings, did precisely the opposite of what this Court in Kelley v. Everglades Drainage Dist. , 319 U.S. 415, instructed; they analyzed the record to try to supply findings which the trial Court failed to make.

The fact that the Court of Appeals panel changed the District Court's finding that the "evidence presented by Petitioner in an attempt to show that White drivers were not treated as severely was not directly on point.." to its finding that "he (Petitioner) was treated no differently than non-minority employees" shows the unacceptable risks inherent in an Appellate Court supplying the facts.

The Courts have carved out narrow exceptions to the general rule that cases will be remanded if the District Court applied an improper legal standard.

The Court of Appeals Panel attempted to fall into the exception that remand is unnecessary where the Appellate

Court has a complete understanding of the issues. See Swanson v. Levy, 509 F2 559 (1975).

As noted above, the District Court's failure to state the legal and factual bases for its decision deprived the Appellate Panel of a complete understanding of the issues, and this is further evidenced by the Panel's change in the District Court's findings of fact.

Further, remand need not occur if the record permits only one resolution of the factual issues. Kelley v. Southern Pacific Co., 419 U.S. 318. In this case the Panel admitted that they might have reached a different decision de novo. Thus, under this exception remand would have been required.

Apparently, the Appellate Panel was concerned that a remand meant inevitably the same result would be reached. Such speculation is not acceptable. If the District Judge by way of a remand were forced to clearly articulate his findings and conclusions, Petitioner would know whether he had applied improper legal standards (e.g. restrictions on the evidence relevant to pretext) in his evaluation of the evidence in this case. If another appeal were then necessary the Appellate Panel would not be placed in a position of having to guess or presume what the trial court found.

This Court has recently stated in Pullman Standard v. Swint, 102 S. Ct. 1981 that the finding of the existence or non-existence of intentional discrimination is a finding of fact. However, this Court in Pullman Standard, supra, did not just reverse, but remanded the case because the Court of Appeals had found the District Court had made certain legal errors in evaluating the evidence. Thus, this Court should remand this case and instruct the Trial Judge to make the proper findings and conclusions so that it may be properly determined whether the Trial Court made errors of law in its evaluation of the evidence.

3. The Courts of Appeals for the Fourth, Seventh and Ninth Circuits have ruled on the level of findings required by Rule 52 (a) of the FRCP in employment discrimination cases and all have reached a conclusion different from the Sixth Circuit's Opinion in Petitioner's case.

The Fourth Circuit, in Equal Employment Opportunity Commission v. United Virginia Bank/Seaboard National, 555 F2d 403 (GA 4 Cir.), in very similar circumstances to the instant case reversed and remanded with directions, the trial court's order.

The Panel stated at 405:

> The findings of facts, on which the judgment was granted, were phrased in broad conclusory terms and did not include any subsidiary findings which would give appropriate support to the Court's conclusory findings. Thus, in dismissing individual discrimination claims, the Court's finding was that "the Court is of the opinion that the plaintiff has not borne the burden imposed on it in the McDonnell case." Previously in its opinion, the Court had stated the "requirements *** of the McDonnell case" but it did not indicate at any point in its opinion which requirement, as declared in McDonnell, was not proved by the Plaintiff.

In determining that Rule 52 (a) had not been complied with the panel in EEOC v. United Virginia Bank/Seaboard National, supra, went on that page to say:

> When the trial court provides only conclusory findings, illuminated by no subsidiary findings or reasoning on all the relevant facts, as was the case here, there is not that "detail and exactness" on the material issues of fact necessary for an understanding by an appellate court of the factual basis for the trial court's findings and conclusions, and for a rational determination of whether the findings of the trial court are clearly erroneous. It was to assure that "detail and exactness" in the trial court's findings as a predicate for intelligent appellate review that Rule 52 (a) was adopted. The failure of the District Court to comply in this case with the basic requirement of the Rule for

> detailed findings of fact compels us to remand the cause for detailed findings of fact and conclusions of law by the trial court.

In the Seventh Circuit in Worthy v. United States Steel, 616 F2d 698 (CA 7 Cir.), the court stressed the importance of the trial court making a thorough analysis of a Plaintiff's evidence of pretext. In the Worthy case the District Court had found that Mr. Worthy's safety record "placed him at the same level if not worse than Whites who were demoted." Therefore, he had not shown pretext (as a bad safety record could be a legitimate non-discriminatory reason for demotion of a crane man).

On Appeal Worthy contended that the District Court's findings were erroneous because the Court failed to consider the evidence in the record that Whites with worse records than Worthy were not demoted.

The Seventh Circuit, siding with Worthy, stated as follows:

> Appellee may well be correct that the facts which it cited placed Worthy in a separate category which justified his harsher treatment. In order to determine comparability, however, the district court was obliged to conduct a thorough inquiry into the treatment of comparable employees. That inquiry could not stop with the determination that comparable whites were demoted. Before a finding could be made that there was no pretext, it was necessary for the district court to consider also the evidence presented by Worthy purportedly showing that there were comparable whites who were not demoted or not disciplined. Otherwise, an employer involved in racial discrimination could demote or discipline some whites as a token gesture to show similar treatment while leaving the majority of the favored employees free from any disciplinary action. Worthy, supra at 703.

In support of its remand the panel in Worthy, supra, at 704, further said:

> Although the district court made the ultimate finding of comparability by its finding that Worthy's safety record "placed him at the same level, if not worse, as white cranemen who were demoted", it is not possible to ascertain from the opinion the factual basis for that ultimate finding. In the determination of comparability, the Supreme Court has cautioned that "precise equivalence" is not the ultimate issue. CF McDonald v. Santa Fe Trail Transportation Co., 427 U.S. at 283 n.11.

The Ninth Circuit in the recent case of Sumner v. San Diego Urban League, 681 F2d 1140 (9th Cir.) reversed and remanded a District Court's decision which had found that Plaintiff had failed to prove by a preponderance of the evidence that she was discriminated against and terminated by reason of her sex."

Commenting on the level of findings of fact necessary to comply with Federal Rule 52(a) the Panel said:

> Although the plaintiff bears the ultimate burden of proving discrimination, the shifting intermediate burdens of going forward are intended to "bring the litigants and the court expeditiously and fairly to this ultimate question." Burdine, 450 U.S. at 253, 101 S. Ct. at 1093. The Findings of and Conclusions of Law under Rule 52 should serve rather than defeat that purpose, and that purpose can be served only if the findings and conclusions address the intermediate issues.
>
> Sumner v. San Diego Urban League, supra at 1143.

The Panel then emphasized that because Burdine gave new emphasis to the importance of the McDonnell Douglas allocation of burdens and order of presentation of proof, that

to satisfy Rule 52 (a) in employment discrimination cases, the findings had to be so explicit as to give the appellate court a clear understanding of the trial court's decision.

The failure of the Sixth Circuit to remand Petitioner's case stands in stark contrast to the Fourth, Seventh, and Ninth Circuit's decisions. This Court should bring the Sixth Circuit into conformity with these other circuits.

This Court need not in this case decide the level of findings necessary in all employment discrimination cases to satisfy Rule 52 (a), but it should grant the writ, find the findings inadequate, and summarily remand this case for appropriate findings.

Respectfully submitted.

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